

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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PLR-103962-11

Date:

July 08, 2011

In re:

TY:

Legend

Taxpayer =

Common Parent =

Parent 1 =

Parent 2 =

Subsidiary REIT =

Accounting Firm =

Date 1 =

Date 2 =

Date 3 =

Year 1 =

Year 2 =

Year 3 =

\$aa =

Manager =

Employee =

Partner =

Dear :

This letter is in response to a ruling request dated submitted on behalf of Taxpayer by Parent 1, Taxpayer's successor in interest, requesting an extension of time to make a consent dividend election under section 565 of the Internal Revenue Code. This request is made pursuant to sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations. This letter supersedes the letter dated .

FACTS

Taxpayer is a corporation that has elected to be treated as a real estate investment trust ("REIT") for Federal income tax purpose since Date 1. Taxpayer uses the accrual method of accounting and files its tax returns on a calendar-year basis.

During Year 1, Parent 2 owned all of the outstanding common shares and some of the outstanding preferred shares of Taxpayer. Unrelated investors also owned preferred shares of Taxpayer. Parent 2 was a member of Common Parent's consolidated group and was included on Common Parent's consolidated Federal income tax return. Also during Year 1, Taxpayer owned common and preferred shares of Subsidiary REIT and unrelated investors owned preferred shares of Subsidiary REIT. On Date 2, both Parent 2 and Taxpayer were merged into Parent 1, with Parent 1 assuming all assets and liabilities of Taxpayer and, in each case, with Parent 1 surviving as the successor in interest.

Taxpayer timely filed its Form 1120-REIT for tax year Year 1. With its return, Taxpayer included a Form 972 "Consent of Shareholder to Include Specific Amounts In Gross Income" reflecting consent dividends with respect to common stock in the amount of \$aa, and a Form 973 "Corporation Claim for Deduction for Consent Dividends." However, instead of showing Taxpayer's information on Line 1 and Parent 2 as the shareholder including the \$aa consent dividend in income, the Form 972 showed Subsidiary REIT's information on Line 1 and Taxpayer as the shareholder.

Taxpayer's Year 1 Federal income tax return was prepared by employees in Common Parent's tax department and signed by Partner at Accounting Firm as paid preparer. During the preparation of Taxpayer's Year 1 return, Employee prepared a first draft of the Form 972 using tax preparation software. The draft of the Form 972 was reviewed by Manager, who made no changes to the draft Form 972 because the draft Form 972 correctly reflected Parent 2 as the shareholder including the \$aa of consent dividends in income and Taxpayer's information on Line 1. However when Taxpayer's complete Federal income tax return was prepared, Common Parent's employees used a different tax preparation software that erroneously populated the Form 972 with Taxpayer's name and identifying number as the shareholder including the consent dividend in income and Subsidiary REIT's information on Line 1. When Common Parent's employees reviewed the completed return, they did not notice the error. Further, Partner reviewed the completed return and also did not notice the error.

On Date 3, Common Parent's employees met with members of the Service's examination team examining Common Parent's consolidated Federal income tax returns for Year 1, Year 2, and Year 3. Prior to the meeting, Common Parent's employees had provided Taxpayer's Form 972, among other information, to the Service's employees. Common Parent's employees discovered the errors on the Form

972 when one of the members of the examination team asked for clarification with regards to the names on the Form 972 filed with Taxpayer's Year 1 return during the meeting on Date 3.

LAW AND ANALYSIS

Section 565(a) of the Internal Revenue Code provides that if any person owns consent stock (as defined in section 565(f)(1)) in a corporation on the last day of the taxable year of such corporation, and such person agrees, in a consent filed with the return of such corporation in accordance with the regulations, to treat as a dividend the amount specified in such consent, the amount so specified shall, except as provided in section 565(b), constitute a consent dividend for purposes of section 561 (relating to the deduction for dividends paid).

Section 1.565-1(a) of the Income Tax Regulations provides that the dividends paid deduction, as defined in section 561, includes the consent dividends for the taxable year. A consent dividend is a hypothetical distribution (as distinguished from an actual distribution) made by certain corporations to any person who owns consent stock on the last day of the taxable year of such corporation and who agrees to treat the hypothetical distribution as an actual dividend, subject to specified limitations, by filing a consent at the time and in the manner specified in section 1.565-1(b). Section 1.565-1(b)(3) provides that a consent may be filed not later than the due date of the corporation's income tax return for the taxable year for which the dividends paid deduction is claimed. Under Rev. Rul. 78-296, 1978-2 C.B. 183, the due date for purposes of section 1.565-1(b)(3) includes the extended due date of a return filed pursuant to an extension of time to file.

Section 301.9100-1(c) provides that the Commissioner of Internal Revenue, in exercising his discretion, may grant a reasonable extension of time under the rules set forth in section 301.9100-3 to make a regulatory election under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I. The term "regulatory election" is defined in section 301.9100-1(b) as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

Under section 301.9100-3(b)(1)(i), except as provided in paragraphs (b)(3)(i) through (iii), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief before the failure to make the regulatory election is discovered by the Service.

Paragraphs (b)(3)(i) through (iii) of section 301.9100-3 provide that a taxpayer is deemed not to have acted reasonably and in good faith if the taxpayer:

(i) seeks to alter a return position for which an accuracy-related penalty could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested;

(ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(1) provides that the interests of the government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made. The interests of the government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years that would have been affected by the election had it been timely made, are closed by the period of limitations on assessment.

CONCLUSION

Based upon our analysis of the facts, Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Therefore the requirements of sections 301.9100-1 and 301.9100-3 have been met.

Under the facts represented, Taxpayer's failure to make a proper consent dividend election was not due to the intentional disregard of the tax rules, but was due to inadvertent errors on the part of Common Parent's tax professionals. Taxpayer did not affirmatively choose not to file the election. Taxpayer is not seeking to alter a return position or to use hindsight to request relief. Finally, Taxpayer acted promptly in filing its request for relief, before the Service discovered the failure to make the regulatory election. Therefore, Taxpayer did not act unreasonably or in bad faith.

Furthermore, granting relief will not result in Taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the election had been timely made, nor will any closed years be affected. Therefore, the interests of the government will not be prejudiced by granting the request for relief.

Because Taxpayer acted reasonably and in good faith, and because the interests of the government will not be prejudiced if the request for relief is granted, Taxpayer is granted an extension of 45 days from the date of this ruling to file its consent dividend election. A copy of this letter should be attached to the amended return filed reflecting the election.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

Further, no opinion is expressed or implied whether Taxpayer, Subsidiary REIT or any entity mentioned in this letter that purports to be a REIT qualifies as a REIT under Part II of Subchapter M of Chapter 1 of the Code.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Thomas D. Moffitt
Branch Chief, Branch 2
(Income Tax & Accounting)

cc: